

DEPARTMENT OF STATE REVENUE

**LETTER OF FINDINGS NUMBER: 00-0001
SALES AND USE TAX
FOR TAX PERIODS: 1996-1997**

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Issues

1. Sales and Use Tax: Riverboat Casino

Authority: IC 6-2.5-3-2(a),

The taxpayer protests the imposition of tax on its riverboat casino.

2. Sales and Use Tax: Computer Software

Authority: IC 6-2.5-3-2(a), Sales and Use Tax Information Bulletin #8, dated January 15, 1982; Revised May 23, 1983.

The taxpayer protests the imposition of tax on computer software and licensing agreements.

3. Sale and Use Tax: Lump Sum or Time and Materials Contracts

The taxpayer protests the imposition of tax on materials used in improvements to the taxpayer's gaming vessel.

Statement of Facts

The taxpayer operates a casino riverboat. The taxpayer opened its gaming boat in approximately June 1996 with a leased vessel and later purchased a new gaming vessel in 1997. The Indiana Department of Revenue audited the taxpayer and assessed additional sales and use tax. The taxpayer timely protested the assessment and a hearing was held.

1. Sales and Use Tax: Riverboat Casino

Pursuant to IC 6-2.5-3-2(a), Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana. In 1997 the taxpayer purchased a new riverboat casino which it operated in Indiana waters. In its audit, the Indiana Department of Revenue imposed use tax on the taxpayer's gaming vessel.

The taxpayer protests the assessment claiming that the riverboat casino is actually real estate and therefore not subject to the use tax which is only imposed on tangible personal property. The taxpayer bases its contention on the definition of real property found in the law governing the Indiana property tax, IC 6.1-1-15 as follows:

"Real Property" means:

- (1) land located within this state;
- (2) a building or fixture situated on land located within this state;
- (3) an appurtenance to land located within this state;
- (4) an estate in land located within this state, or an estate, right, or privilege in mines located on or minerals, including but not limited to oil or gas, located in the land, if the estate, right, or privilege is distinct from the ownership of the surface of the land; and
- (5) notwithstanding IC 6-6-6-7, a riverboat licensed under the provisions of IC 4-33 for which the state board of tax commissioners shall prescribe standards to be used by township assessors.

The first four items in the property tax definition of real property are the commonly understood definitions of real property. The last item concerning the classification of riverboats such as the taxpayer's riverboat was added in 1995 to specifically denominate riverboat casinos as real property for purposes of the tax on real property. The fact that the legislature considered it necessary to specifically classify riverboats as real property for purposes of property tax when all other property in the state is classified pursuant to the first four items indicates that the classification is counterintuitive to the generally held understanding of a riverboat as tangible personal property. Although the Department may look to the classification of property for property tax purposes to assist in determining whether difficult to classify property is tangible personal property for sales tax purposes, it is not required to do so.

The issue to be determined is whether the taxpayer's gaming vessel is tangible personal property for sales and use tax purposes. "Tangible" is defined as "discernable by the touch or capable of being touched" in Webster's II New Riverside University Dictionary, The Riverside Publishing Company, 1988 at page 1182. The same dictionary at page 877 defines "personal property" as "temporary or movable property as distinguished real property." A gaming vessel is movable property that can be touched. The boat actually has a pilot and life preservers for travel in the water. It operates under authority of the U.S. Department of Transportation. It is not permanently attached to the land. Generally, then, the taxpayer's riverboat casino would be considered tangible personal property.

The Sales and Use Tax Regulations do not give a definition of tangible personal property for sales and use tax purposes. They do, however, refer to boats and watercraft as subject to the sales and use tax. 45 IAC 2.2-3-6 (a)(2) defines “watercraft” as

a contrivance used or designed for navigation on water, including a vessel, boat, motor vessel, steam vessel, sailboat, vessel operated by machinery either permanently or temporarily affixed, scow, tugboat or any marine equipment that is capable of carrying passengers, except a ferry.

The taxpayer’s riverboat casino clearly falls within the sales and use tax regulatory definition of “watercraft.” 45 IAC 2.2-3-6(c)(2) specifically imposes use tax on Indiana watercraft purchased out of state. By these standards, the taxpayer’s riverboat casino is tangible personal property and subject to the sales and use tax. Since there is a specific definition and imposition of sales and use tax on boats in the Sales and Use Tax Regulations, the Indiana Department of Revenue does not need to look to the property tax statute for assistance in classification of the gaming vessel as tangible personal property subject to the sales and use tax.

Alternatively, the taxpayer contends that if the Department finds that its gaming vessel is tangible personal property and qualifies for imposition of the sales and use taxes, then that gaming vessel qualifies for the public transportation exemption found at IC 6-2.5-5-27 as follows:

Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

To bolster its argument that the riverboat casino qualifies for the provision of public transportation exemption, the taxpayer offers evidence that the vessel’s operation is regulated by the U.S. Department of Transportation and that those regulations are enforced by the U.S. Coast Guard.

The only purpose of the taxpayer’s gaming vessel is the provision of an opportunity for people to gamble legally. Persons seeking transportation in the state of Indiana do not consider the taxpayer’s services. The previously cited sales and use tax regulation specifically states that a ferry would not be subject to the imposition of tax. The taxpayer’s boat can not be considered a ferry in that it doesn’t transport anyone from one point to another point. At most the boat moves people in Indiana waters so that they can gamble legally. The taxpayer’s riverboat casino does not qualify for the public transportation exemption from the sales and use tax.

Finally, the taxpayer argues that the classification of the riverboat casino as real property for property tax purposes and tangible personal property for sales and use tax purposes violates the United States Constitution, Amendment 14 and Article I, Section 12 of the Indiana Constitution. An administrative hearing is not the proper forum for the determination of constitutional issues.

Finding

The taxpayer's first point of protest is denied.

2. Sales and Use Tax: Computer Software

The taxpayer protests the imposition of use tax on its purchases of software and software licensing agreements. Examples of the software and licensing agreements purchased and used include a diskette software for a speaker phone, HR system software and IBM 16/4 Auto Tr Sa virus scan. The use tax was imposed pursuant to IC 6-2.5-3-2(a) which provides that "an excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. . ." The taxpayer contends that the software and software licensing agreements are not subject to use tax because they are intangible personal property and the tax is only imposed on tangible personal property.

Sales and Use Tax Information Bulletin No. 8 dated January 15, 1982; Revised May 23, 1983 clarifies the Indiana Department of Revenue position on software and software licensing systems. On Page 2 the Information Bulletin states as follows:

Pre-written programs, not specifically designed for one purchaser, developed by the seller for sale or lease on the general market in the form of tangible personal property and sold or leased in the form of tangible personal property are subject to tax irrespective of the fact that the program may require some modification for a purchaser's particular computer.

The programs and licensing agreements at issue in this audit are the type of canned software clarified as taxable in Sales and Use Tax Information Bulletin 8. The modifications necessary for the taxpayer were not sufficient to remove any of the items to the classification of custom software which would not be subject to the sales and use tax.

Finding

This point of the taxpayer's protest is denied.

3. Sale and Use Tax: Lump Sum or Time and Materials Contracts

Discussion

The taxpayer's final point of protest concerns the imposition of use tax on materials used in improving the taxpayer's gaming vessels pursuant to IC 6-2.5-3-2(a). The taxpayer contends that the contractors rather than the taxpayer are responsible for the remittance of sales and use tax on any materials used as part of the construction contracts. The taxpayer bases this contention on 45 IAC 2.2-3-9(d)(1) and 45 IAC 2.2-3-9(e)(3) which deal with construction contracts for the improvement of real estate. As discussed in the first issue of the taxpayer's protest, the gaming vessels are tangible personal property rather than real estate for sales tax purposes. Therefore the cited Sales and Use Tax Regulations do not apply in this instance and the taxpayer is subject to use tax on materials used in improving its riverboat casinos.

Finding

The taxpayer's final point of protest is denied.

KA/PE/MR-011307